No. 12-10

IN THE

Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,
Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY
INTERNATIONAL, INC., *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF CERTAIN CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are a bipartisan, bicameral group of nine current and former United States Senators and Members of the United States House of Representatives who were instrumental in the development, drafting, and passage of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (the "Act"), 22 U.S.C. §§ 7601 *et seq.*, and/or the reauthorization of the Act in 2008. *Amici* have a strong interest in ensuring that this Court has accurate information regarding Congress's objectives and intent in enacting and reauthorizing the Act, including the provision at issue in this litigation – 22 U.S.C. § 7631(f) (the "Policy Requirement").

Michael B. Enzi has been a Republican Senator since 1997. Since joining the Senate, he has been a member of the Senate Health, Education, Labor and Pensions ("HELP") Committee, serving as its Chairman from 2005 to 2007 and its Ranking Minority Member from 2008 to 2012. He has been a leader in moving the United States forward in its battle against HIV/AIDS globally. In his positions on the HELP Committee and the Senate Committee on Foreign Relations, Senator Enzi played a key role in the passage of the 2003 Act and its 2008 reauthorization.

Patrick Leahy has been a Democratic Senator since 1974 and currently serves as Chairman of the Senate Judiciary Committee and the Senate Appropriations Committee Subcommittee on State, Foreign Operations, and Related Programs, which oversees

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[1] Counsel for *Amici* authored this brief in its entirety. No person or entity other than *Amici* and their counsel made monetary contributions to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

programs that are funded pursuant to the Act. When the Act was under consideration in 2003, Senator Leahy spoke on the Senate Floor about the need for private organizations to reach out to and work directly with commercial sex workers as part of an effective HIV/AIDS-fighting strategy and the Policy Requirement's potential adverse impact on such outreach efforts.

Thomas A. Daschle was a Democratic Senator from 1987 to 2005, the Senate Majority Leader from 2001 to 2003, and the Senate Minority Leader from 1995 to 2001 and 2003 to 2005. Senator Daschle played an integral role in the effort to pass the Act in the Senate. Since leaving Congress, Senator Daschle has continued to distinguish himself as a leader and expert on domestic and global health issues. In 2012, he was named a Co-Chair of the International Advisory Board of the Center for the Church and Global AIDS.

William H. Frist, M.D., a nationally recognized heart and lung transplant surgeon, was a Republican Senator from 1995 to 2007 and the Senate Majority Leader from 2003 to 2007. Senator Frist was one of the leaders of the conception, development, and passage of the Act in the Senate. He spoke on the Senate floor in 2003 in support of the Act and the need to support organizations that work directly with sex workers as part of an effective HIV/AIDS prevention strategy. Senator Frist's longstanding dedication to HIV/AIDS and other global health issues has continued since his departure from the Senate.

Barbara Lee is a Democratic Member of the House of Representatives. Since becoming a member in 1998, Congresswoman Lee has established herself as one of the most committed leaders in the fight against HIV/AIDS. She has authored or co-authored

every major piece of legislation dealing with global HIV/AIDS issues since she was elected to Congress, including the Act.

Nita M. Lowey has been a Democratic Member of the House of Representatives since 1989, and is the Ranking Democratic Member of the House Appropriations Committee and its Subcommittee on State, Foreign Operations, and Related Programs, which oversees programs funded under the Act. Congresswoman Lowey was Chair of the Subcommittee on State, Foreign Operations, and Related Programs in 2008, when the reauthorization of the Act was passed. Congresswoman Lowey has been and remains a strong advocate for global health and development, including the United States' global efforts to save the lives of people affected by HIV/AIDS and other deadly diseases.

Henry A. Waxman is a Democratic Member of the House of Representatives. During his more than 35 years as a House Member, Congressman Waxman has been a leader on HIV/AIDS and other health care issues, sponsoring numerous health bills that have been enacted into law. In 2008, Congressman Waxman spoke about the harms caused by application of the Policy Requirement.

Howard L. Berman was a Democratic Member of the House of Representatives from 1983 to 2013. In 2003, Congressman Berman was a member of the House Committee on Foreign Affairs, from which the Act arose. At that time, he spoke on the House floor about the potential for the Policy Requirement to impede the provision of assistance to women engaged in prostitution. Congressman Berman also served as Chairman of the House Committee on Foreign Affairs from 2008 to 2011, and the 2008 reauthorization of

the Act arose from that Committee during his tenure as Chairman.

James Kolbe was a Republican Member of the House of Representatives from 1985 to 2007. During his final six years in the House, Congressman Kolbe was the Chairman of the House Appropriations Committee Subcommittee on Foreign Operations, Export Financing, and Related Programs (now known as the Subcommittee on State, Foreign Operations, and Related Programs), which oversees programs that are funded pursuant to the Act. He is a recipient of the George Marshall Award for Distinguished Service from the United States Agency for International Development.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question before this Court is whether § 7631(f) of the Act, which requires organizations to have a policy explicitly opposing prostitution in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment. In briefing this question, Petitioners have mischaracterized the Policy Requirement in two fundamental respects. In this brief, *Amici* respond to and correct Petitioners' incorrect characterizations of the Act's language and Congress's intent.

First, Petitioners misconstrue a requirement that private organizations communicate a certification or pledge solely to the government as a requirement that they convey a government message to third parties. But the Act clearly distinguishes between these two types of requirements, and does so precisely to ensure that the Policy Requirement does *not* use private organizations to convey a government message explicitly opposing prostitution.

Second, Petitioners incorrectly characterize the Policy Requirement as one of multiple discretionary, subjective criteria that the government may consider in deciding how to allocate competitive funding. But it is evident from the text of the Policy Requirement, the Act's implementing regulations, and written funding opportunity announcements issued by the agency primarily responsible for making funding decisions that the Policy Requirement is a determinative, objective condition of disbursement of funds to an applicant that already has completed the competitive evaluation process and been selected to receive a funding grant.

Petitioners' mischaracterizations of the Policy Requirement reflect a deeper lack of appreciation of the life-saving objectives that Congress sought to accomplish with the Act, and the strategy that Congress deliberately chose to accomplish those objectives. In 2003, Congress found that: (1) "HIV/AIDS has assumed pandemic proportions, spreading . . . to all corners of the world, and leaving an unprecedented path of death and devastation"; (2) "more than 65,000,000 individuals worldwide have been infected with HIV," and "more than 25,000,000 of these individuals have lost their lives"; and (3) HIV/AIDS "threatens personal security," "undermines the economic security of a country and individual businesses," "destabilizes communities," "weakens the defenses of countries," and "poses a serious security issue for the international community." 22 U.S.C. § 7601(1), (2), (6)-(10). Recognizing that this "crisis demands a comprehensive, long-term, international response," *id.* § 7601(21), Congress passed and the President signed the Act in order to "launch[]" the "largest, single upfront commitment in history for an international public health initiative involving a spe-

cific disease." *Remarks on Signing the United States Leadership Act Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, 1 Pub. Papers 541, 541 (May 27, 2003), *available at* http://2001-2009.state.gov/p/af/rls/74868.htm. The Act commits "unprecedented resources" to this "lifesaving" initiative – $15 billion between 2003 and 2008, and an additional $48 billion between 2008 and 2013. *Id.* at 543-44; 22 U.S.C. § 7671(a).

As stated in the Act, its purpose is to "strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics and other related and preventable infectious diseases as part of the overall United States health and development agenda" through a comprehensive strategy that includes: (1) "develop[ing] safe and effective vaccines, microbicides, and other prevention and treatment technologies"; (2) "improv[ing] diagnostic capabilities"; (3) supporting "prevention, treatment, and care programs"; (4) "expanding public-private sector partnerships" with non-governmental agencies, which Congress recognized "have proven effective in combating the HIV/AIDS pandemic"; and (5) "improving harmonization of United States efforts with national strategies of partner governments and other public and private entities." 22 U.S.C. §§ 7601(18), 7603(1)(B), (3)(C), (4), (5)(A)-(B).

Congress determined that the Act's HIV/AIDS "prevention" strategy should "make the reduction of HIV/AIDS behavioral risks," including prostitution, "a priority." 22 U.S.C. § 7611(a)(12). However, Congress justifiably decided that the strategy for accomplishing this goal should *not* include using private organizations to convey a government message explicitly opposing prostitution because such a message

would be likely to (1) alienate host nations, potential partner organizations, and individuals in this high-risk group, and therefore (2) impede the outreach and collaboration that are necessary to accomplish the Act's objectives of "treatment," "care," "prevention," "expanding public-private partnerships," and "harmonization" with "partner governments" and entities. Instead, Congress decided that the most effective way to address prostitution and other high-risk behaviors, except those involving violence or coercion, was through various types of education and counseling. *See, e.g.*, *id.* § 7611(a)(12)(A), (B), (C), (F), & (H) (strategy to reduce "behavioral risks" includes "educating men and boys about the risks of procuring sex commercially," "encouraging . . . use of male and female condoms," and "promot[ing] alternative livelihoods . . . for commercial sex workers"). *Compare id.* § 7611(a)(12)(I) & (J) (requiring "cooperation with law enforcement to prosecute offenders of trafficking, rape, and sexual assault crimes with the goal of eliminating such crimes," and "working to eliminate rape, gender-based violence, [and] sexual assault"). Congress also recognized that implementation of its chosen strategy of education and counseling would include efforts by some organizations to reach out to and work directly with commercial sex workers. *See, e.g.*, 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Leahy) ("we need to . . . support . . . organizations" that "work directly with commercial sex workers . . . to educate them about HIV/AIDS, to counsel them to get tested," and "to provide them with condoms"); *id.* (statement of Sen. Frist, responding to Sen. Leahy) ("I agree that these organizations . . . play an important role" and "[w]e need to support the[m]").

This does not mean that Congress intended to promote or encourage prostitution. To the contrary, the Act provides that "[n]o funds made available" under the Act "may be used to promote or advocate the legalization or practice of prostitution." 22 U.S.C. § 7631(e). Rather, the strategy that Congress chose reflects Congress's determination that, absent violence or coercion, conveying a government message explicitly opposing prostitution is not an effective way to address that high-risk behavior and could disserve the Act's HIV/AIDS-fighting purpose.

Consistent with this determination, Congress deliberately crafted the Policy Requirement so that it would *not* use funding recipients to convey a government message explicitly opposing prostitution. The Policy Requirement obligates each recipient, as a condition of receiving funds, to pledge to the government that it has a "policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f). As Petitioner has emphasized, recipients are not required to disclose this pledge to anyone else. Pet. Br. at 27. The Act's legislative history shows that Congress fashioned the Policy Requirement this way precisely to avoid the harms that could result from using recipients to convey a message explicitly opposing prostitution. The Policy Requirement thus contrasts sharply with other provisions of the Act that *do* require the conveyance of government messages about other topics. *See, e.g.*, 22 U.S.C. § 7611(h) ("each program receiving funds under this chapter" must "prominently display[]" a "message" that "the program is a commitment by citizens of the United States to the global fight against HIV/AIDS" and "is an effort on behalf of the citizens of the United States").

Petitioners have taken the position that the Policy Requirement does not violate the First Amendment

because, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 833 (1995) (citing *Rust v. Sullivan*, 500 U.S. 173, 196-200 (1991)). *See* Pet. Br. at 31-33. Petitioners also have argued that the Policy Requirement is permissible under this Court's decision in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), because "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 587-88. *See* Pet. Br. at 13, 40. Both of these positions are incorrect. Because Congress never intended to use funding recipients to convey a government message explicitly opposing prostitution, the Policy Requirement cannot accurately be characterized as a "governmental message" provision. Congress also did not intend the Policy Requirement to be one of multiple discretionary, subjective "criteria" considered in order to "allocate competitive funding"; rather, it chose to make the Policy Requirement an express, objective condition of any disbursement of funds to recipients that already have been selected. Because both of Petitioners' characterizations of the Policy Requirement are at odds with the Act's text and Congress's expressed intent, neither characterization should be used as a basis for a decision regarding the Policy Requirement's constitutionality.

ARGUMENT

I. THE ACT'S HIV/AIDS-FIGHTING STRATEGY DOES NOT INCLUDE USING FUNDING RECIPIENTS TO CONVEY A GOVERNMENT MESSAGE OPPOSING PROSTITUTION.

Petitioners contend that the Policy Requirement should be upheld because "the government" is "disburs[ing] public funds" under the Act "to private entities to convey a governmental message" explicitly opposing prostitution. *Rosenberger*, 515 U.S. at 833; Pet. Br. at 31-33. This contention reflects a fundamental misunderstanding of the Act. The HIV/AIDS-fighting strategy chosen by Congress and reflected in the Act does not include using funding recipients to convey a government message explicitly opposing prostitution. Rather, the Act entails a comprehensive set of hands-on strategies to prevent transmission of HIV/AIDS and to provide treatment and care for individuals and communities affected by the disease. To the extent the Act addresses prostitution at all, it reflects Congress's selection of education and counseling as the tools for doing so. Consistent with this choice, Congress purposely crafted the Policy Requirement so that it would *not* use funding recipients to convey a message explicitly opposing prostitution.

A. The Act Reflects Congress's Selection Of Education And Counseling Rather Than Condemnation To Address Prostitution.

Congress determined that one aspect of the Act's wide-ranging HIV/AIDS "prevention" strategy would be to "make the reduction of HIV/AIDS behavioral risks a priority," and that the most effective way to accomplish this reduction was through various types of education and counseling, including: (1) "educat-

ing men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls"; (2) "encouraging the correct and consistent use of male and female condoms"; (3) "supporting comprehensive programs to promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers and their families"; (4) "promoting the delay of sexual debut and the reduction of multiple concurrent sexual partners"; and (5) "promoting abstinence from sexual activity and encouraging monogamy and faithfulness." 22 U.S.C. § 7611(a)(12)(A), (B), (C), (F), & (H). Although these education and counseling strategies include "encouraging" and "promoting" lower-risk behaviors and lifestyles, they do not include conveying a message explicitly opposing prostitution. *See, e.g.* Pet. Br. at 26 ("Congress therefore directed that *educational efforts* concentrate on 'specific populations that represent a particularly high risk of contracting or spreading HIV/AIDS . . . .'") (emphasis added).

There is a compelling justification for this approach. Congress understood that an effective HIV/AIDS-fighting strategy requires not only collaboration with foreign governments and organizations, but also efforts by certain organizations to reach out to and work directly with commercial sex workers. As emphasized during the 2003 Congressional debates:

> There are organizations who work directly with commercial sex workers and women who have been the victims of trafficking, to educate them about HIV/AIDS, to counsel them to get tested, to help them escape if they are being held against their will, and to provide them with condoms to protect themselves from infection. This work is not easy. It can also be dangerous. It

> requires a relationship of trust between the organizations and the women who need protection.
>
> . . . [W]e need to be able to support these organizations.

149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Leahy). *See also id.* (statement of Sen. Frist, responding to Sen. Leahy) ("I agree that these organizations who work with prostitutes and women who are the victims of trafficking play an important role in preventing the spread of HIV/AIDS. We need to support these organizations . . . ."). A policy explicitly opposing prostitution is likely to impede that collaboration and outreach by: (1) offending host nations, organizations, and groups that funding recipients seek to influence and help; (2) deterring funding recipients from providing (or even discussing) effective treatment or prevention programs for individuals in this high-risk group; (3) causing those individuals to feel stigmatized, and therefore deterring them from taking advantage of any treatment and prevention programs that are available. *See, e.g.*, CAJA 882, 884 ¶¶ 23, 26; CAJA 847-48 ¶ 25; 154 Cong. Rec. H7120 (daily ed. July 24, 2008) (statement of Rep. Waxman) (Policy Requirement "has reportedly had the unintended consequence of scaring grantees away from doing effective outreach programs for sex workers").

At the same time, Congress understood that education and counseling are not sufficient to address sex "trafficking" and certain other types of violence and coercion because "[v]ictims of coercive sexual encounters do not get to make choices about their sexual activities." 22 U.S.C. § 7601(23). Thus, the Act requires (1) "promoting cooperation with law enforcement to prosecute offenders of trafficking, rape, and sexual assault crimes with the goal of eliminating

such crimes," and (2) "working to eliminate rape, gender-based violence, sexual assault, and the sexual assault of women and children." *Id.* § 7611(a)(12)(I) & (J). However, the Act does not require such efforts to "prosecute" or "eliminate" prostitution that does not involve violence or coercion. To the contrary, when it reauthorized the Act in 2008, Congress *removed* a provision that explicitly made "eradicating prostitution" part of the Act's strategy for "the reduction of HIV/AIDS behavioral risks." *Id.* § 7611(a)(4) (2004). *See also* 154 Cong. Rec. S1742 (daily ed. Mar. 7, 2008) (statement of Sen. Biden) (2008 amendments to Act "make[] important adjustments based on lessons learned over the past 5 years"); *Various Bills and Resolutions – Markup Before the H. Comm. on Foreign Affairs*, Serial No. 110-158, 110th Cong. 206-07 (2008) ("Feb. 27, 2008 Markup") (statement of Rep. Berman) ("We also have 5 years of experience under our belts. We know what works and what does not."). By making this change, Congress confirmed its intent to use education and counseling to address prostitution not involving violence or coercion.

The Act also includes a Congressional finding that:

> Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the Unites States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic. One in nine South Africans is living with AIDS, and sexual assault is rampant, at a victimization rate of one in three women. Meanwhile in Cambodia, as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast

> Asia. Victims of coercive sexual encounters do not get to make choices about their sexual activities.

22 U.S.C. § 7601(23). Petitioners rely heavily on the first sentence of this finding, which is one of forty-one findings contained in Section 7601, to support their claim that the Policy Requirement is intended to convey a government message explicitly opposing all prostitution. Pet. Br. at 26. However, read as a whole, the finding makes clear that it addresses prostitution in the contexts of sex "trafficking," "sexual violence," and "coercive sexual encounters." Moreover, the finding does not require recipients to convey any message or take any action; nor does it prescribe *how* prostitution should be addressed. Rather, those prescriptions are contained in other provisions of the Act, including Section 7611. As explained above, those provisions reflect Congress's choice of education and counseling as the tools to address prostitution.

B. Congress Purposely Crafted The Policy Requirement So That It Would *Not* Use Funding Recipients To Convey A Government Message Opposing Prostitution.

The Act contains only one provision requiring that any "message" be conveyed on behalf of the United States government. That provision, entitled "Message," requires "[t]he Global AIDS Coordinator" to "develop a *message*, to be *prominently displayed* by each program receiving funds under this chapter" that "the program is a commitment by citizens of the United States to the global fight against HIV/AIDS" and "is an effort on behalf of the citizens of the United States." 22 U.S.C. § 7611(h) (emphases added). Section 7611(h) demonstrates that, where Congress intended to convey a government message regarding

programs or activities funded under the Act, it made that intent clear with an explicit provision in the Act.

The Policy Requirement is fundamentally different from Section 7611(h)'s "message" provision. It obligates each recipient, as a condition of receiving funds under the Act, *to assure the government* that it "ha[s] a policy explicitly opposing prostitution." 22 U.S.C. § 7631(f); Pet. Br. at 44 ("By signing the award documents and accepting federal funds pursuant to those agreements, recipients thereby 'agree that they are opposed to the practices of prostitution . . . .'"). But it does *not* require the recipient to disclose this "policy" to anyone but the government. Pet. Br. at 22, 27, 43 n.6. This is consistent with the descriptions of the Policy Requirement by its author and others in Congress. *See, e.g.*, 154 Cong. Rec. H7116 (daily ed. July 24, 2008) (statement of Rep. Smith) ("[t]he legislation before us also retains the antiprostitution/sex trafficking *pledge*") (emphasis added); 154 Cong. Rec. H1906 (daily ed. Apr. 2, 2008) (statement of Rep. Ros-Lehtinen) (USAID "has implemented [the Policy Requirement] by requiring that any group that receives funding sign a *pledge affirming* its opposition to" prostitution and sex trafficking) (emphasis added). As these descriptions confirm, the Policy Requirement compels each funding recipient to "pledge" *to* the government that the recipient adopts the government's viewpoint, but does not compel any recipient to convey that viewpoint in a message *on behalf of the government* to others.

Moreover, the Act's legislative history confirms that Congress deliberately crafted the Policy Requirement this way to *avoid* using recipients to convey a government message explicitly opposing prostitution. During the 2003 Congressional debates, concerns were raised that the Policy Requirement could be

perceived as "condemn[ing] the behavior" of commercial sex workers, and therefore "could impede" the "effectiveness" of efforts to "work directly with" people in that high-risk group. 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Leahy). To accommodate the "need to support . . . organizations" that "work with prostitutes," while at the same time not "condon[ing] . . . prostitution or sex trafficking," Congress concluded that "the answer" was "to include a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women." *Id.* (statement of Sen. Frist, responding to Sen. Leahy).

II. THE POLICY REQUIREMENT IS NOT ONE OF MULTIPLE DISCRETIONARY, SUBJECTIVE CRITERIA USED TO ALLOCATE COMPETITIVE FUNDING.

Petitioners also argue that the Policy Requirement is valid under this Court's decision in *Finley* because "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." 524 U.S. at 587-88. *See* Pet. Br. at 13, 40. This, too, is a fundamental mischaracterization of Policy Requirement's language and Congress's intent. Congress knows how to craft statutes that "allocate competitive funding" according to discretionary, subjective criteria when it wishes to do so. But that is not how Congress crafted the Policy Requirement. Instead, Congress chose to make the Policy Requirement an objective and determinative condition of funding. Because of this Congressional choice, the

Policy Requirement cannot properly be characterized as the type of provision that was at issue in *Finley*.

This Court in *Finley* upheld a 1990 amendment to the National Foundation on the Arts and the Humanities Act of 1965, 20 U.S.C. §§ 951 *et seq.*, that required the National Endowment of the Arts ("NEA") to "'tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public'" in evaluating the "'artistic excellence and artistic merit'" of applications for funding. 524 U.S. at 572 (quoting 20 U.S.C. § 954(d)(1)). In doing so, this Court emphasized that the provision "d[id] not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application." *Id.* at 580-81; *see also id.* at 581 ("§ 954(d)(1) imposes no categorical requirement"). Instead, the statute specified "decency and respect" only as "consideration[s]" to be taken into account by the NEA as part of the "competitive process according to which the grants are allocated." *Id.* at 586. Moreover, these "consideration[s]" were "subjective" factors "susceptible to multiple interpretations," which meant that "one could hardly anticipate how [they] would bear on" particular grant applications. *Id.* at 583. These characteristics, this Court concluded, provided reassurance that the provision will not "inevitably . . . be utilized as a tool for invidious discrimination" among viewpoints or to "effectively preclude or punish the expression of particular views." *Id.* at 582-83. *See also, e.g.*, *United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003) (plurality opinion) (heightened scrutiny inapplicable to libraries' discretionary consideration of content "in making collection decisions"); *id.* at 216-17 (Breyer, J., concurring in the

judgment) (strict scrutiny unnecessary for library's exercise of "discretion necessary to create, maintain, or select [its] 'collection'").

Finley has no application here because Congress chose to craft the Policy Requirement in a way that is fundamentally different from the statute at issue there. The criteria that the Department of Health and Human Services ("HHS") uses to evaluate funding applications under the Act are specified in written funding opportunity announcements ("FOAs") issued by HHS. *See, e.g.*, HHS, Agency Funding Opportunity No. CDC-RFA-GH13-1309, *Increasing HIV/AIDS Program Capacity through Human Resources Capacity Building to Support the Transition of the Kenya HIV Program to Local Organizations under the President's Emergency Plan for AIDS Relief (PEPFAR)*, (Feb. 27, 2013) ("Kenya FOA"), *available at* http://www.grants.gov/search/search.do?mode=VIEW&oppId=217813 (follow "full announcement" hyperlink, then follow either full announcement option). The criteria are: (1) "Ability to Carry Out the Proposal"; (2) "Technical and Programmatic Approach"; (3) "Capacity Building"; (4) "Monitoring and Evaluation"; (5) "Understanding of the Problem"; (6) "Personnel"; (7) "Administration and Management"; (8) "Budget . . . and Budget Narrative"; and (9) "Funding Preferences." *Id.* at 45-49. Application of these criteria requires inherently subjective determinations. Although the FOA specifies the weight that HHS gives to each criterion (*id.*), nothing in the FOA, the applicable regulations, or the text of the Act states that any criterion is determinative or otherwise constrains HHS's discretion regarding how to interpret or apply any of the criteria.

But Congress did not make the Policy Requirement simply one of multiple discretionary, subjective crite-

ria that the HHS *could* consider in evaluating funding applications. Instead, Congress made the Policy Requirement a determinative, objective condition of disbursement of funds to an applicant that already has completed the competitive evaluation process and been selected to receive a grant. Moreover, Congress did not give HHS or any other agency charged with implementing the Act any discretion regarding whether to apply or how much weight to give the Policy Requirement. This is evident from the language of the Policy Requirement, HHS's regulations, and the FOAs. *See* 22 U.S.C. § 7631(f) ("No funds made available to carry out this chapter . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking . . . ."); 45 C.F.R. § 89.1(b) (Policy Requirement "shall also be included in the award documents for any grant, cooperative agreement or other funding instrument involving Leadership Act HIV/AIDS funds entered into with the recipient"); Kenya FOA at 41 ("certifications" of compliance with Policy Requirement "are prerequisites to the payment of any U.S. Government funds"); *id.* (compliance "is an express term and condition of receiving U.S. Government funds").

This distinction between a discretionary, subjective criterion and a determinative, objective condition is one of multiple reasons that the Policy Requirement should not be upheld under this Court's decision in *Finley*. Because the Policy Requirement falls into the latter of these two categories, it is susceptible to being "utilized as a tool for invidious discrimination" among viewpoints or to "effectively preclude or punish the expression of particular views." 524 U.S. at 582-83. Indeed, the Policy Requirement's author in Congress emphasized that its purpose was to require

that recipient organizations explicitly adopt the government's favored viewpoint. *See, e.g., United States Leadership Against AIDS/HIV, Tuberculosis, and Malaria Act of 2003 – Markup Before the H. Comm. on International Relations*, Serial No. 108-33, 108th Cong. 149 (2003) (statement of Rep. Smith) ("The issue that is before us today is whether or not we will provide money to organizations that seek the legalization of prostitution . . . ."); Feb. 27, 2008 Markup at 252 (statement of Rep. Smith) ("we do not want NGOs that support . . . prostitution . . . to be getting this money"). For this reason alone, the Policy Requirement bears no meaningful resemblance to the provision at issue in *Finley*.

Moreover, in *Finley*, the government sought to apply viewpoint-discriminatory criteria only in its selection of which specific art *projects* it wished to fund. Here, in contrast, the government seeks to control the viewpoints, speech, and activities of *grantee organizations in their entirety* – including viewpoints, speech, and activities that are outside the scope of any program for which the grantees are receiving federal funds.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that, in resolving this case, this Court should not adopt Petitioners' incorrect characterization of the Policy Requirement as either (1) a "governmental message" provision, or (2) one of multiple discretionary, subjective "criteria" that are considered in order to "allocate competitive funding."

Respectfully submitted,

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